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IN THE

Supreme Court of the United States

EVAN CAROLYN,

Petitioner,

v.

ORANGE PARK COMMUNITY ASSOCIATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the California Court of Appeal may unilaterally create an exemption from application of the definition of "Public Accommodation" in 42 U.S.C. § 12181(7) of the Americans With Disabilities Act ("ADA") which enables a private entity to close and remove disabled access which had been in existence for over 30 years to a recreational equestrian trail system which otherwise remains open to all members of the public, thereby effectively nullifying the ADA's equal access purpose?

2. May the California Court of Appeal unilaterally create an amendment to the definition of "Public Accommodation" in 42 U.S.C. of § 12181(7) of the Americans With Disabilities Act ("ADA") providing authority to a private entity to deny disabled access to its recreational trails facility which offers otherwise unfettered public access, based on a hypothetical analysis that the private entity could have excluded the public from access to its facilitiy although no such exclusion had ever occurred?

3. Did the published opinion of the California Court of Appeal conflict with this Court's decision in *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 121 S. Ct. 1879 (2001), by restrictively construing the statutory definition of "Public Accommodation" of 42 U.S.C. § 12181(7), thereby limiting the scope of the ADA and the right of the federal government to require equal access to the disabled by affirming the trial court's refusal to consider the uncontroverted evidence demonstrating that the

recreational facility "affects commerce" in reaching the determination that a recreational trail system was not a Public Accommodation for purposes of the ADA?

4. Under the new rule announced by the California Court of Appeal, what is the appropriate standard for determining whether a facility is a "Public Accommodation" for purposes of the ADA where there are recreational facilities that are conceded to be open to the pubic without restriction?

a. Is "failing to actively deny the public access to the recreational property" by the private entity that owns or operates the recreational property sufficient grounds to prevent classification of a recreational property as a "Public Accommodation" under 42 U.S.C. § 12181(7) as held by the Court of Appeal?

b. Is "failing to actively deny the public access" a sufficiently concrete standard to avoid running afoul of the purpose of the ADA under § 12101 (b) (3) to ensure that the Federal Government plays a central role in enforcing the standards established . . . on behalf of individuals with disabilities?

c. Is a history of unfettered public access to a recreational facility that affects commerce sufficient or must the facility engage in a level of active solicitation of the public to be held a "Public Accomodation" under 42 U.S.C. § 12181(7)?

d. If active solicitation of the public is required to be a "Public Accommodation" under 42 U.S.C. § 12181(7), what is the required threshold degree of such conduct?

5. Does the failure to provide any objectively ascertainable application of its newly created exemption to the application of the definition of "Public Accommodation" in 42 U.S.C. § 12181(7) conflict with Congress' stated purpose of the ADA as set forth in 42 U.S.C. § 12101(b)(2) to create clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities?

6. Does the newly created exemption from application of the Public Accommodation definition of 42 U.S.C. § 12181(7) conflict with the purpose of the ADA set forth in 42 U.S.C. § 12101(b) (4) to invoke the sweep of congressional authority, including the commerce power, to enforce rights of the disabled pursuant to the Fourteenth Amendment and to regulate commerce, in order to address the major areas of discrimination faced day to day by people with disabilities?

PARTIES TO THE PROCEEDING

Petitioner is Evan Carolyn, an individual.

Respondent is Orange Park Community Association, a non-profit corporation, organized and existing under the laws of the State of California.

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OPINIONS BELOW

The opinion of the California Court of Appeal is reported as *Carolyn v. Orange Park Community Association*, 177 Cal.App.4th 1090, 99 Cal.Rptr.3d 699 (2009), 2009 Cal.App. LEXIS 1556, 14 Accom. Disabled Dec. (CCH) ¶ 14-019; rehearing denied 2009 Cal.App. LEXIS 1705 (Cal.App.4th Dist. October 19, 2009). The opinion is set forth at Appendix A.

Review was denied by the California State Supreme Court as *Carolyn (Evan) v. Orange Park Community Association* 2009 Cal LEXIS 13494 (Cal. Dec. 23, 2009) without published opinion. A copy of the order denying review is at Appendix F.

CONCISE STATEMENT OF THE BASIS FOR JURISDICTION

The judgment sought to be reviewed was entered on October 23, 2008.

The opinion of the California Court of Appeal was filed on September 21, 2009 with the decision approved for publication.

Rehearing was denied by the California Court of Appeal on October 19, 2009. A petition for review by the California State Supreme Court was denied on December 23, 2009.

Article III, Section 2 of the Constitution of the United States confers jurisdiction upon this Court.

This Court also has jurisdiction over this case under 28 U.S.C. § 1257 because the decision of the California Court of Appeal involves denial of the rights of Petitioner Evan Carolyn under a United States statute, specifically Title III of the Americans With Disabilities Act, 42 U.S.C. § 12101, *et seq.* The highest court of the State of California, the California State Supreme Court, denied discretionary review of the decision of the California Court of Appeal. Denial of discretionary review by the highest court of a state is deemed to render the decision with respect to which review is denied to be the decision of the court of last resort of a state. *See Supreme Court Rule 13.1.*

Supreme Court Rule 10(c) provides that where a state court has decided an important question of federal law in a way that conflicts with relevant decisions of this Court, the Court will consider review on *certiorari*. The decisions below concerning *Carolyn v. Orange Park Community Association, supra*, directly conflict with Supreme Court decisional authority, including but not limited to *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 121 S.Ct. 1879 (2001); as well as with the definition of Public Accommodation enacted by Congress in the Americans With Disabilities Act at 42 U.S.C. § 12181(7).

This Court has jurisdiction to clarify standards in interpretation of federal statutes, including disapproval of lower court interpretations. *See Hazen Paper Co. v. Biggins*, 507 U.S. 604,608, 113 S.Ct. 1701, 1705 (1993).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

TITLE 42—THE PUBLIC HEALTH AND WELFARE

CHAPTER 126—EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES

Sec. 12101. Findings and purpose

* * * *

(b) Purpose

It is the purpose of this chapter—

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

> (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

(Pub. L. 101-336, Sec. 2, July 26, 1990, 104 Stat. 328.)

The definition of "Public Accommodation" under Americans With Disabilities Act, is found in 42 United States Code § 12181(7) (See Appendix H).

42 United States Code § 12181(7). provides, in relevant part, as follows:

> The following private entities are considered public accommodations for purposes of this subchapter, if the operations of such entities affect commerce —
>
> * * *
>
> (I) A park, zoo, amusement park, **or other place of recreation**;
>
> * * *
>
> (L) A gymnasium, health spa, bowling alley, golf course, **or other place of exercise or recreation**. [emphasis added]

14th Amendment to United States Constitution. See Appendix H.

U.S. Constitution, Article I, Section 8; Article VI. See Appendix H

STATEMENT OF THE CASE

This case involves the creation by the California Court of Appeal of a new and pervasive exemption from the Americans with Disabilities Act 42 U.S.C. § 12101 *et seq.* (hereinafter sometimes referred to as "ADA") which overrides the statutory definition of Public Accommodation under 42 U.S.C. § 12181 (7) to exempt virtually any private entity from ADA compliance simply by an assertion that the entity had the right to exclude the public from its facility and had just not actively availed itself of that right. Therefore, utilizing this judicially crafted exemption, a private entity owning a facility which otherwise falls within the definition of a "Public Accommodation" pursuant to 42 U.S.C. § 12181 (7) may prohibit or remove disabled access after many years of such access being available while maintaining unfettered public access to the same facility for those who are not disabled.

The newly created exemption relies solely on the hypothetical possibility of exclusion of the public and an amorphous suggestion that the ADA shall have no application simply because a private entity has not sought to actively exclude the public.

Pursuant to the California Court of Appeal opinion, evidence of public use of a recreational facility and the

consequent effects upon commerce becomes irrelevant and no evidence that the operations of such entities affect commerce need even be considered.

The California Court of Appeal decision creates widespread implications by its imposition of novel limits on the application of the ADA. The published opinion provides judicial validation for any private entity to assert that its facility which fits the statutory definition of Public Accommodation is not subject to ADA compliance requirements.

The California Court of Appeal decision provides neither standards nor guidance for determination when a privately owned recreational facility that has offered unfettered public access will be subject to ADA compliance as a Public Accommodation. The opinion provides that private property does not fall within the ambit of the definition of Public Accommodation even if it is clearly within the parameters of one of the twelve described categories listed in 42 U.S.C. § 12181(7) regardless that public access is openly permitted and without regard to whether or not the facility affects commerce if it possible to assert that such access could have been excluded and that access was permitted as a result of the lack of active exclusion of the public.

Further, in direct contravention of both 42 U.S.C. § 12181(7) and this Court's holding in *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 121 S.Ct. 1879 (2001), the California Court of Appeal's holding provides that a trial court need not even consider the public nature of the operations of the facility or whether it affects commerce. The California Court of Appeal decision removes factual

consideration of the federal statutory definition as well as the commerce clause criterion from the determination. Thus, the decision effectively guts the application of the ADA to any private entity.

The exemption from application of the ADA definition of Public Accommodation created by the California Court of Appeal has no limitations or standards. It alters the issue of applicability of ADA compliance to facilities of the type set forth in 42 U.S.C. § 12181(7), as broadly construed, from actual public use and effect on commerce to a subjective measure of the potential state of mind of the private entity ownership. It is not even clear that the private entity must have ever considered exclusion of the public, the test as stated in the California Court of Appeal Opinion demands only that there exist the hypothetical possibility of exclusion.

The California Court of Appeal decision creates an exemption which relies not on the nature of the facility and its operation, as provided by the ADA definition, but rather on speculation of what a private entity might have or could have done. In the absence of any standard or limitation, the decision presents not merely a judicial limitation on the application of the ADA, but rather, in the unrestrained discretion of the owner or operator of a Public Accommodation, a complete bar replacing the right to equal access with the right to arbitrary discrimination.

The danger in such an approach is that it does not merely open the door to ADA avoidance, it provides a blanket exemption under which the majority of private

entities can maintain public access without ADA compliance. It returns California and any jurisdiction that might look to this opinion for guidance back to the pre-ADA era for the disabled and shreds the protection and purpose upon which the ADA was founded.

The stated purpose of the ADA is:

> (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
>
> (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
>
> (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and
>
> (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

42 U.S.C. § 12101(b)

The California Court of Appeal decision undermines the mandate for the elimination of discrimination against the disabled by enabling avoidance of the key fundamental statutory definition of "Public Accommodation" which determines what facilities are subject to the ADA. This new rule does so by creating an exemption from the application of the federal statutory definition for the private entity which could have but has not actively excluded the public.

Even if this truncation of the ADA definition were permissible, there is no standard provided as mandated by paragraph 2 of the stated purpose for the application of this exemption from the definition of Public Accommodation.

The Petitioner here had demonstrated unfettered public access to the OPCA Trail System for a period of thirty years. The Court of Appeal opinion confirmed the trial court directive that it is not necessary to even reach the issue of whether operation of the trail system affected commerce, thereby denying the scope of protection afforded by the federal statute, the ADA, and the 14th Amendment.

This Court has provided clear and unmistakable guidance to lower courts concerning the application of the ADA. *In PGA Tour, Inc. v. Martin, supra*, this Court squarely addressed the proper interpretation and construction of the term Public Accommodation as defined by the ADA.

> The phrase 'public accommodation' is defined in terms of 12 extensive categories

> [footnote omitted] which the legislative history indicates **'should be construed liberally'** to afford people with disabilities 'equal access' to the wide variety of establishments available to the not disabled [footnote omitted] (532 U.S. at 676-677, emphasis added.).

The creation of an exemption which provides a clear and easy opt-out from application of the ADA by limiting the applicability of the federal statutory definition of "Public Accommodation" directly conflicts with the holding in *PGA Tour, Inc. supra.* The California Court of Appeal has not only rejected a liberal interpretation of Public Accommodation, it has so restricted the application of the term as to assure that private entities will be able to avoid application of the ADA at will.

The Court should grant *certiorari* to review the California Court of Appeal decision. Failure to do so will leave the largest state in population in the U.S. with no protection under the ADA for the disabled in reference to private entities whose facilities are otherwise within the definition of Public Accommodation. Further, even if justification for the California Court of Appeal decision were assumed, *arguendo*, the lack of standards alone demands that this Court provide the guidance guaranteed under ADA's mandate for "**clear, strong, consistent, enforceable standards**" for its application.

FACTUAL AND PROCEDURAL HISTORY

Orange Park Community Association ("OPCA") owns and operates an equestrian trail system (the "OPCA Trail System") which had been open to the public with access for the disabled for approximately thirty years. The OPCA Trail System interconnects with other trail systems similarly open to the disabled and all members of the public forming a network of equestrian trails in Southern California. Historically the OPCA Trail System was open for use by the disabled using horse drawn carts and carriages as well as by riders who could ride astride.

In July of 2007, OPCA erected physical barriers to its trails system which blocked access by the disabled using horse drawn carts or carriages. The Petitioner, Evan Carolyn is a disabled American veteran who sought to use the OPCA Trail system but was prohibited from doing so by the newly erected barriers placed at the trail heads by OPCA. Mr. Carolyn requested removal of the barriers in writing. OPCA refused to respond and ignored his written request. Thereafter, Petitioner filed an action under the ADA, the Unruh Act, and the California Disabled Persons Act against OPCA.

In the course of discovery, OPCA officers and directors testified in depositions that: (1) the OPCA trail system is a place of recreation; (2) the OPCA Trail System was open to the public; (3) that OPCA is a private entity and (4) that the OPCA Trail system was used by hay delivery trucks and farriers among others.

Cross Motions for summary judgement were filed based upon the facts presented in the deposition testimony along with uncontroverted evidence presented by declaration that the OPCA trail system affected commerce. The trial court denied the Petitioner's motion and granted that of the Defendant on the ground that OPCA Trail System was not a Public Accommodation. The trial court declined to provide any factual foundation for its holding and ignored the OPCA admissions that the trail was a place of recreation which was open to the public.

A. *Application of 42 U.S.C. § 12181(7) Definition of Public Accommodation Raised to the Trial Court in Papers Filed Prior to the Summary Judgment Hearing and In Oral Argument*

Petitioner raised the proper construction of the ADA concerning the definition of Public Accommodation to the trial court on multiple occasions. First, it was raised in the Petitioner's Opposition to the Defendant's Motion for Summary Judgment, filed on August 22, 2008. Petitioner again offered authority and discussion concerning the ADA and its Public Accommodation definition to the trial court in Plaintiff's Reply to Defendant OPCA's Opposition to Plaintiff's Motion for Summary Judgment or in the Alternative for Summary Adjudication of Issues filed on August 29, 2008.

The Court's tentative ruling was posted online on September 4, 2008.

On September 5, 2008, Petitioner appeared before Trial court Judge Steven Perk and through his counsel argued orally, in part, as follows:

> **MR. HUSBAND:** Your Honor, plaintiff is puzzled by the tentative concerning Public Accommodation. That is the key to the case. 42 USC 12181 — and this is in my papers, your Honor, but if I may briefly read the definition so we know what we are talking about, I think it will facilitate the argument. Do I have leave of Court?
>
> **THE COURT:** Sure
>
> **Mr. HUSBAND:** Thank you, your Honor.
>
> Public accommodation. And I'm reading from 42 USC, section 12181, subsection 7. Public accommodations. 'The following private entities are considered public accommodations for purpose of this subchapter if the operation of such entities affect commerce:' And then there's a list of a number of categories. The relevant categories here, your Honor, are category I, which includes a park, zoo, amusement park, or other *place of recreation.* Also subsection L, which says gymnasium, health spa, bowling alley, golf course, or *other place of exercise or recreation.*
>
> Plaintiff believes that defendant's trail system meets this definition. In the papers before the Court, the defendant has admitted that it is a

private entity. The equestrian trail system, plaintiff submits, is an *other place of recreation* as suggested in either subsection I or subsection L. [emphasis added]

* * * *

As a place of recreation, the plaintiff believes that it fits within the list specified in 42 USC 12181, subsection 7.

Also, your Honor, the case was cited in the moving papers, but plaintiff would urge the Court to consider, again, the Supreme Court's opinion in *PGA Tour v. Martin*, 532 U.S. 661. The liberal construction of the term *public accommodation* is specifically endorsed by the Supreme Court as follows — I'm reading from footnote 23 of the *Par* — or, excuse me, *PGA Tour v. Martin*.

"The phrase 'public accommodation' is defined in terms of 12 extensive categories which the legislative history indicates 'should be construed liberally' to afford people with disabilities equal access to the wide variety of establishments available to the nondisabled."

That's precisely this case, you Honor. As a matter of fact, in *PGA v. Martin*, what the Supreme Court held was that a public accommodation was not even limited to a place. In *PGA v. Martin*, the Supreme Court

> held that a tour, the golf tour, was a place of public accommodation for purposes of the Americans with Disabilities Act.
>
> * * * *
>
> The defendant has admitted – and this is in the papers in the separate statements, your Honor – that it operates a trail system. Another element of the definition is satisfied.
>
> The only one left is that it affects commerce. And in the affecting commerce area, this should be considered in two respects: One is factually, the other is legally.
>
> In the legal respect, your Honor – this is the *Wickard v. Filburn* case. This is a case – I'll cite other authority – in which Congress has chosen to extend its authority as far as it can, which is pretty far.
>
> * * * *

The trial judge declined to change his tentative ruling. Summary judgment was granted on the ground that Defendant's equestrian trail system was not a Public Accommodation.

B. *Statutory Definition of "Public Accommodation" and Applicable Supreme Court Authority Brought to the Attention of the California Court of Appeal in Two Briefs*

Petitioner appealed to the California Court of Appeal. The issue concerning proper construction and application of the definition of Public Accommodation in the ADA was made in Appellant's Brief at pages 2-3; 5; and particularly in pages 15-24; also at pages 26-28; and 29-36. Discussion of the relevant authorities concerning the issue of federal statutory application raised by this Petition for Writ of Certiorari were also raised in Appellant's Reply Brief to the Court of Appeal in pages 7-10, 15-18 and 20. In particular in Appellant's Opening Brief, Petitioner raised the federal statutory construction issue as follows:

> "2. *The U.S. Supreme Court held that Construction of "Public Accommodation" for ADA Purposes is to Be Liberal*

The Supreme Court in *PGA Tour, Inc. v. Martin* squarely addressed the proper interpretation and construction of the phrase here in issue as follows:

> The phrase 'public accommodation" is defined in terms of 12 extensive categories [footnote omitted] which the legislative history indicates '***should be construed liberally***' to afford people with disabilities 'equal access' to the wide variety of establishments available to non-disabled [fn. omitted]

(532 U.S. at 767-677, emphasis added.)

The Supreme Court, in *PGA Tour, Inc. v. Martin*, was construing the ADA, the same federal law here in issue. The Supreme Court held that under the liberal construction intended by Congress, the Professional Golfing Association Tour was a public accommodation for purposes of the Americans With Disabilities Act, even though the PGA Tour, Inc. itself did not even own real property. The Supreme Court found that it was apparent, based on both the general rule and the comprehensive definition of "public accommodation," that the PGA's golf tours were within the coverage of Title III, and therefore the PGA must not discriminate against any disabled individual in the full and equal enjoyment of the facilities, services, privileges, and accommodations of the PGA Tour.

The key words of 42 U.S.C. § 12181(7) are "affects commerce." In *Jones v. United States*, 529 U.S. 848, 120 S.Ct. 1904, 146 L.Ed.2d 902, the Supreme Court noted that when the words "affecting commerce" are used without qualification, that Congress' intent to invoke its full authority under the Commerce Clause is manifest. (529 U.S. at 854.) And the words "affects commerce" are used without qualification in 42 U.S.C. § 12181(7).

3. *OPCA Officials Admitted That The OPCA Trail System Is Open To The Public*

According to the record of this case, three representatives of the OPCA admitted that its trail system is open to the public. (AA:436, 434-435 [deposition testimony of OPCA Director Albert Harrison Pritts ("AH Pritts

Depo."); AA:445 [deposition testimony of OPCA Arena & Trails Chairperson Joanne Pritts ("Joanne Pritts Depo")]; AA:496-497 [deposition testimony of OPCA Director Rex Vance ("Vance Depo")].)

4. *OPCA Officials Admitted that the OPCA Trail System is a Place of Recreation*

Three OPCA officials also admitted that the OPCA trails are part of an integrated trail system connected to trails and trail systems of other communities. (AA:446 [Joanne Pritts Depo.]; AA:452; [deposition testimony of OPCA President James Waite Dickinson ("Dick Depo"]; AA:496-497 [Vance Depo]).

Thus, it is undisputed that the OPCA trail system is a place of recreation open to the public and integrated with other trail systems. These admissions may suffice in and of themselves to qualify the OPCA trail system as a public accommodation under 42 U.S.C. § 12181(7) when the mandated liberal construction is applied. At the very least, this evidence demonstrates a controverted issue of material fact that precludes summary judgment. But there was more evidence before the trial court concerning the public accommodation status of the OPCA trail system.

5. *Admissions by OPCA that Establish that the OPCA Trail System Affects Commerce*

The following additional admissions of OPCA create issues of fact that OPCA's operation of its trail system affects commerce. These admissions include:

- OPCA trails are used for delivery of hay, feed, and shavings, by use of trucks. See Joanne Pritts depo AA:443, 447; Dick Depo AA: 452-453;

- OPCA contracts with a California corporation to maintain a section of the OPCA trail system on a regular basis (Vance Depo AA:489-490);

- OPCA's board is aware that horse owners in the OPCA area use farriers and equine veterinarians (Vance Depo AA:493-494);

- Most people in OPCA have hay delivered from a local feed store by a 2 ½ ton flatbed truck, using the OPCA trail system (Vance Depo AA:494-495; Dick Depo AA:452-453); and

- The OPCA Director Rex Lee Vance admitted that if a number of horses in the OPCA area was reduced by half, there would be a significant economic impact to the suppliers of goods and services to horsemen in that area (AA:496)."

The California Court of Appeal's opinion not only failed to properly apply the ADA, but in addition, created a new and unjustified overriding limitation, the "no active exclusion rule" on the definition of Public Accommodation in the federal civil rights statute, the ADA. Further, the Court of Appeals decision affirmed the trial court's determination that it was unnecessary to reach the issue of whether the OPCA Trail System "affected commerce" under the statutory definition of 42 U.S.C. § 12181. Refusal to consider the commerce issue was a reaffirmation that the facts of actual public use would no longer be considered in the context of the ADA. While the trial court erred by failing to properly apply the statutory definition, the Court of Appeals magnified and compounded the problem by announcing the new test for avoiding classification as a Public Accommodation and publishing its opinion.

The California Court of Appeals decision was issued and approved for publication on September 21, 2009. Petitioner filed a Petition for Rehearing with the Court of Appeal on October 5, 2009.

C. *Petition for Rehearing by the Court of Appeal Raised the Issue that the Court of Appeal Opinion Created a New Rule Which Contradicted Controlling Federal Statute and Conflicted with U.S. Supreme Court Precedent*

The Petition for Rehearing raised the error which this petition seeks to correct in pages 2-11. Petitioner's outline of argument included the headings:

> "The Opn. proposes a new rule which contradicts controlling statutes."

* * * *

> "The statutory definition of Public Accommodation found in 42 U.S.C. 12181(7) which was not applied in the Opn. to determine whether the OPCA Trail System is a Public Accommodation within the meaning of the ADA, the Unruh Act, and the California Disabled Persons Act would have lead to a different result."

The Petition for Rehearing to the California Court of Appeal specifically stated:

> "The opinion is not based on relevant statute or precedent, but rather enunciates a new rule, unsupported by controlling statutory law or case law, and inconsistent with relevant law. . . . The Opn. fails to apply the ADA definition which is also applicable to the Unruh Act and the California Disabled Persons Act and an error of law is constituted by such failure. . . . The Opn. made an error of law in failing to address whether the OPCA Trail System 'affected commerce', an essential element of 42 U.S.C. 12181 and therefore an improper analysis of whether the OPCA Trail System was a Public Accommodation under relevant law was made."

The Petition for Rehearing quoted a relevant part of the Court of Appeal Opinion as follows:

> We hold only that a private property owner (here a homeowners association) does not convert a private recreational property into a public accommodation by failing to actively deny the public access to the recreational property.' (Opn. at 18-19)

and replied:

> "Again, this approach is an error of law. The statutory standards set forth in the ADA, the Unruh Act and the California Disabled Persons Act are bypassed and ignored by such a ruling. See 42 U.S.C. § 12181(7); *PGA v. Martin, supra.*
>
> "The conclusion that the OPCA Trail System was not a place of public accommodation was based on a failure to apply the proper statutory standards for determining whether the trail system was a public accommodation.
>
> "The Opn. referred to OPCA's CC&R's but it cannot be seriously maintained that CC&R's can override federal civil rights legislation."

The Petition for Rehearing filed by Petitioner was denied on October 19, 2009.

D. *Petition to California State Supreme Court for Review Raised Issues Concerning Proper Interpretation of "Public Accommodation" Under 42 U.S.C. § 12181(7) and Problems Created by the Court of Appeal's "No Active Exclusion" Test*

Petitioner filed a Petition for Review with the California State Supreme Court. In the Petition for Review, the error of federal law, which was significantly exacerbated by the Court of Appeal opinion, was raised to the California State Supreme Court in pages 5-7, 8, 10, 11-14 and 15-16 of the Petition for Review to the State Supreme Court.

In particular, Petitioner argued:

> ". . . rather than come to the logical and legally compelled conclusion that OPCA's equestrian trails are a Public Accommodation because they are indisputably places of recreation that are open to the public without restriction, the *Carolyn* Court held that they are not a Public Accommodation because 'OPCA *could* bar the general public, including Carolyn, from accessing the trails if it wished to do so,' although there is 'no indication OPCA has ever attempted in the past or intends in the future' to do so." (Opn., pp. 10 italics added, 16-17 ['we think it clear OPCA's trails would not be a Public Accommodation if OPCA actively excluded the general public from using the trails,' and '[w]e do not think OPCA's private trails transform into Public Accommodations merely because OPCA does

not actively exclude members of the public from using the trails'].)

"The Court stated its holding as: '[A] private property owner (here, a homeowners association) does not convert to private recreational property into a Public Accommodation by failing to actively deny the public access to the recreational property.' (Opn., pp. 18-19.)

"In support of its novel 'no active exclusion' theory, the *Carolyn* court cited *Liebler v. Point Loma Tennis Club*, (1995) 40 Cal.App.4th 1600, 1611-1612 (Opn., p. 10), Civil Code § 1009 (*ibid)* and *Coronado, supra*, 163 Cal.App.4th at pp. 836, 845-851 (Opn., p. 17). None is applicable. . . ."

In permitting the erroneous holding to stand the law in California now provides an exemption from the ADA for any private entity that admits the public and could have, but did not ever seek to actively exclude the public. Further, in light of the references to *Lieber and Coronado*, the law in California is not only may a private entity that permits public access avoid any obligation to comply with the ADA, it may also choose to invite the public into its facility and deny access only to disabled individuals to portions of its facilities despite the fact that the entire facility remains open to the public. Under this "no active exclusion" exemption, ADA compliance would not be required to those portions of any privately owned and publically accessible facility if the private entity simply chooses to assert that they

could, if they so desired, deny access to those parts of the Public Accommodation. In essence this is a return to the "you can come in the door, but you can't use the restrooms" philosophy and the pre ADA harsh realities of outright discrimination.

REASONS FOR GRANTING THE PETITION

A. *Articles Posted on the Internet, Seminars, Symposia and Print Media Have Disseminated the New Court of Appeal Exemption From the Definition of "Public Accommodation" and Based Thereon Multitudes of Denials of Disabled Access are Likely to Result.*

In late 2009 as well as in early 2010, homeowners association groups and attorneys who serve them have widely touted the new judicially created exemption from application of the ADA. Simply entering the name of the case below into an internet search engine will reveal over a dozen references, including homeowners association group newsletters, and several law firms, including more than one firm which have prepared seminar handouts, in one instance with three seminars scheduled in separate cities in California during January and February 2010, which describe the new rule and how facilities can be exempt from ADA compliance.

The Metropolitan News-Enterprise, a legal newspaper in Southern California, published an article on Wednesday, September 23, 2009 which described the Court of Appeal decision. The combination of the notoriety which is rapidly being acquired by the new rule, with the fact that private property owners such as

homeowners associations, marinas and many other privately owned facilities which have been open to the public, and which affect commerce, as the Orange Park Community Association trail system does, would be delighted to be free of any obligation to comply with the ADA, results in a likelihood that the decision below will not be merely an isolated case.

Unless this Court grants certiorari, the new exemption from applicability of the ADA, created by the Court of Appeal will remain the law in California. It can be expected to lead to hundreds of instances of barriers being erected to bar the disabled from facilities which would qualify as a Public Accommodations to which the disabled had previously had access, in the same fashion as was done by the Orange Park Community Association. In the past, California law has lead other jurisdictions to adopt new rules. Private entities can save money by avoiding ADA compliance. Each private entity excluding the disabled under the banner of the new "No Active Exclusion" exemption, would thereby be freed of any costs or obligations to comply with the ADA.

B. *The Carolyn v. Orange Park Community Association Opinion Conflicts With this Court's Holding in PGA Tour v. Martin.*

The new rule announced by the California Court of Appeal in *Carolyn, supra*, is 180 degrees from the direction for construction of the statutorily defined "Public Accommodation" mandated by this Court in *PGA Tour, Inc. v. Martin, supra*. The liberal construction of the definition of Public Accommodation under the ADA decreed by *PGA Tour, Inc. v. Martin, supra*, would be

replaced by the new "No Active Exclusion Rule" which liberally *denies* applicability. This holding, if permitted to stand, would enable thousands of Public Accommodations to escape compliance with the ADA.

In fact the *Carolyn* holding in conjunction with that of *Coronado v Cobblestone,* 163 Cal.App.4th 831, 77 Cal.Rptr.3d 883 (2008) (rev'd in part by *Munson v. Del Taco* (2009) 46 Cal.4th 661, 94 Cal.Rptr.3d 685, 208 P.3d 623) effectively nullifies the ADA for application in California. *Coronado* held that a Public Accommodation can have both public and private access areas and compliance with the ADA is limited to those areas which have public access. Under the newly devised Carolyn "no active exclusion" rule, actual public access becomes irrelevant for purposes of determining ADA compliance.

As the new California Court of Appeal *Carolyn* rule requires only a " could have" or " might have" assertion it transforms this unrealized potential to a license to exclude the disabled from restrooms at a stadium, the docks at a marina or any other specific portion of a facility. The California Court of Appeal ruling becomes authority upon which a private entity owning or operating a Public Accommodation can deny the disabled, or worse, can remove access previously established.

OPCA openly admitted the public to its trails for over 30 years and that public included the disabled. In April of 2007, OPCA abruptly closed access to the disabled, leaving the same trails open to the remainder of the public. This new "No Active Exclusion Rule" creates precisely the form of discrimination the ADA

was enacted to prohibit. OPCA has asserted that the ADA does not apply to its recreational facility which is open to the public. The California Court of Appeal has not merely acquiesced in this discrimination, it has facilitated the evisceration of the definition of Public Accommodation and severely constricted the application of the ADA. The OPCA is a private entity operating a recreational facility open to the public which was given the absolute right to deny access to the disabled under the newly created exemption crafted by the California Court of Appeal.

The decision to deny Evan Carolyn disabled access to the recreational trails was made summarily by the trial court despite uncontroverted evidence before it of the effect on commerce of the OPCA Trail System and numerous admissions by OPCA Board Members that the OPCA trail system was a place of recreation which was open to the public. Only the disabled were barred from access by OPCA's decision to erect barriers and only the disabled remain barred from this access.

The California Court of Appeal decision in *Carolyn, supra,* stands as a concrete obstacle to the disabled as surely as the barrier to the disabled erected by the OPCA in 2007. The new rule crafted by the Court of Appeal violates the mandate and purpose of the ADA. It enables circumvention to the definition of Public Accommodation in the ADA, and it directly contradicts this Court's directive and holding in *PGA Tour, Inc. v. Martin, supra.* It is respectfully requested that this Court grant certiorari to maintain the integrity of the ADA.

C. *The Carolyn v. Orange Park Community Association Opinion Would Operate to Deny Federal Civil Rights Under the ADA Which Were Granted By Congress*

The published opinion of the California Court of Appeal in *Carolyn v. Orange Park Community Association* would deny rights of disabled people by creating an unjustified loophole for most recreational private property owners which was certainly not intended by Congress.

The congressional definition of Public Accommodation found in 42 U.S.C. § 12181(7) is avoided by the Court of Appeal opinion in *Carolyn, supra.* Almost all privately owned facilities which are open to the public can be said to be open to the public because the owner does not actively prevent the public from having access. 42 U.S.C. § 12181(7) provides that facilities similar to those listed that affect commerce are subject to the ADA. This Court has held that using the term "affecting commerce" without qualification reflects Congressional intent to exercise its authority to the maximum extent. *See Jones v. United States*, 529 U.S. 848, 120 S.Ct. 1904 146 L.Ed.2d 902 (2000); *Wickard v. Filburn*, 317 U.S. 111, 63 S.Ct. 82 (1942).

The California Court of Appeal now holds that if the access by the public to these facilities is due to lack of active exclusion on the part of the owner, then there is no need to determine whether or not there is any effect on commerce of such facilities — as the federal legislation provides — but rather as a result of this new rule, if the private owner failed to actively deny access

to the public, *ipso facto*, the facility is not a Public Accommodation under the ADA and therefore not subject to the ADA regardless of whether the facility affects commerce under the test set forth by this Court in *Gonzalez v. Raich*, 545 U.S. 1, 125 S.Ct. 2195 (2005), and otherwise qualifies as a Public Accommodation under 42 U.S.C. § 12181(7).

D. *The Impact of the California Court of Appeal Decision is to Create an Amendment to the ADA Exempting From Compliance Virtually All Private Entities and Validating The Denial of Access for the Disabled*

Based on the published opinion the Court of Appeal, any park, any trail, any marina, any facility which clearly meets the federal statutory definition of a Public Accommodation under the ADA, can evade the application of the ADA on a mere assertion that the owner has not actively excluded members of the public — which would include virtually all such facilities.

This novel holding of the California Court of Appeal eviscerates the ADA. It provides published judicial authority to avoid the ADA to hundreds of facilities in California that are Public Accommodations under 42 U.S.C. § 12181(7) and thousands of such facilities across the nation. Further, the application of this new exemption permits not only non-compliance for new facilities, but removal of disabled access by existing recreational facilities and all Public Accommodations from the entire facility or from whatever parts of those facilities the ownership determines were not actively promoted for public use.

The published opinion of the California Court of Appeals in *Carolyn v. Orange Park Community Association* defies the clear mandate of the statutory purpose of the ADA for equal access and for **"clear, strong, consistent, enforceable standards"** (42 U.S.C. § 12101 (b)(3) and this Court's precedent in *PGA Tour v. Martin, supra.* Upon publication, the Court of Appeal decision became a "Get out of Compliance with the ADA Free Card." The opinion, which the California State Supreme Court strengthened by denying review provides spurious authority which can be used to avoid application of the federal civil rights laws found in the ADA, contrary to the clear directive of this Court in *PGA Tour v. Martin, supra* and the stated purpose of the ADA.

CONCLUSION

The definition of "Public Accommodation" in 42 U.S.C. § 12181(7) is the primary determinant of the applicability of the ADA. The Court of Appeal opinion severely truncates this definition, in contravention of the express terms of the statute, and in defiance of this Court's directive in *PGA Tours, Inc. v. Martin, supra.* Attorneys, homeowners association groups and the media are spreading the news of this new exemption from the requirements of the ADA. Unless this Court grants *certiorari*, the law has been changed, contrary to statute and precedent, and the new test will be used to the detriment of hundreds of thousands of disabled people. Simply put, any private entity may exclude the disabled while continuing to welcome the public.

Petitioner urges the petition for a writ of *certiorari* be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DISTRICT THREE FILED SEPTEMBER 21, 2009

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

G041177

(Super. Ct. No. 07CC09555)

EVAN CAROLYN,

Plaintiff and Appellant,

v.

ORANGE PARK COMMUNITY ASSOCIATION,

Defendant and Respondent.

OPINION

Appeal from a judgment of the Superior Court of Orange County, Steven L. Perk, Judge. Affirmed.

Law Offices of B. Paul Husband and B. Paul Husband; and Cheryl Alison Skigin and for Plaintiff and Appellant.

Appendix A

Kulik, Gottesman, Mouton & Siegel and Mitchell S. Brachman for Defendant and Respondent.

* * *

Defendant Orange Park Community Association (OPCA)[1] maintains and exercises control over a series of recreational trails on portions of the association "common area" (Civ. Code, § 1351, subd. (b)). The trails border Broadmoor Park homes and Saddlehill development, OPCA residential developments in Orange Park Acres. The OPCA trails connect to a larger system of trails maintained by other associations or by government entities (such as Orange County and nearby municipalities). In 2007, citing safety concerns for "horseback riders and trail hikers," as well as damage to trail fencing, OPCA installed barriers on its trail entry points to prevent vehicles from utilizing the trails.

Plaintiff Evan Carolyn sued OPCA, alleging he "made plans to use the OPCA Trail System by means of a horse drawn carriage in or about early July, 2007, but discovered that the trails were no longer available for use by disabled people such as himself in a horse drawn carriage and/or other horse drawn vehicle as a result of the alteration of the OPCA Trail System by OPCA. . . ." Based on these factual allegations, Carolyn pleaded five separate causes of action: (1) for violation of title III of

1. OPCA is a "[c]ommon interest development" (Civ. Code, § 1351, subd. (c)) under the Davis-Stirling Common Interest Development Act (Civ. Code, § 1350 et seq.).

the Americans with Disabilities Act (42 U.S.C. § 12181 et seq.; the ADA); (2) for violation of the California Disabled Persons Act (Civ. Code, §§ 54, 54.1); (3) for violation of the Unruh Civil Rights Act (Civ. Code, §§ 51-52); (4) for violation of Health and Safety Code section 19955 et seq.; and (5) for violation of Government Code section 4450 et seq.

The court granted summary judgment in favor of OPCA. The court based its ruling on the determination "that the trails are not a 'public accommodation' within the definition of the Americans with Disabilities Act, California Disabled Persons Act, Unruh Act, Government Code § 4450 and Health and Safety Code § 19955. Unless the trails are a public accommodation within the meaning of the statutes, there is no violation." Carolyn appeals the judgment, claiming the court erred in concluding the trails are not a public accommodation. We affirm.

FACTS

OPCA filed a summary judgment motion based almost entirely on the argument that its trails did not constitute a public accommodation under the ADA or state law. Carolyn filed a summary judgment motion as well, but the court denied his motion and the denial of Carolyn's motion is not before us on appeal.

In support of its motion, OPCA filed declarations of the president of OPCA's Board of Directors and a member of the Arena and Trails Committee for OPCA,

properly referencing this evidence by way of a separate statement of material facts. (Code Civ. Proc., § 437c, subd. (b)(1).) We set forth herein only those material facts identified by OPCA that are pertinent to our review, as well as allegedly disputed material facts offered by Carolyn in opposition to OPCA's motion. (Code Civ. Proc., § 437c, subd. (b)(3).)

OPCA's Separate Statement

We deem the following six facts set forth in OPCA's separate statement to be undisputed, either because Carolyn: (1) failed to meet his obligation of unequivocally stating whether the fact was disputed or undisputed (Code Civ. Proc., § 437c, subd. (b)(3)); (2) raised unmeritorious objections to competent evidence; or (3) presented evidence that failed to raise a triable issue with regard to OPCA's stated fact.

(1) "[OPCA] is a non-profit corporation operating, organized and existing under the laws of the State of California." (2) "Plaintiff Evan Carolyn is not a homeowner or resident of [OPCA], does not pay assessments and is not entitled to the protections of the Association's CC&Rs." (3) "[OPCA's] trails are privately owned as common area of the Association and are operated by a Board of Directors . . . ."[2] (4) "Under Article IV, Section 1 of the Association CC&Rs, 'each

2. While the larger trail system to which OPCA's trails connect is owned in part by Orange County and in part by other associations and municipalities, the OPCA trails over which OPCA exercises control are owned by OPCA.

member of the Association has a right and easement of access, use and enjoyment in and to the Common Area and such easement shall be appurtenant to and shall pass with the title to every Lot subject to assessment." (5) "The Arena and Trails Committee made recommendations to the Association Board of Directors for ways to remedy dangerous conditions on the Association's trails."[3] (6) "[OPCA] is a private entity which funds the maintenance and operation of its Common Area through monthly assessments paid by the Residential Lot Owners."

Carolyn's Additional Material Facts

Carolyn did not "set forth plainly and concisely any other material facts" he contended were disputed (i.e., by separately listing additional disputed facts in his separate statement). (Code Civ. Proc., §437c, subd. (b)(3).) Nevertheless, we set forth herein the relevant evidence submitted by Carolyn bearing on the question of whether OPCA's trails are "public accommodations."

Of primary importance to Carolyn's opposition is certain deposition testimony. Utilizing leading questions, counsel for Carolyn elicited key admissions from OPCA

3. Carolyn raised a triable issue of fact with regard to the extent of OPCA's investigation of safety issues and damage to the trail fences, as well as "whether or not dangerous conditions existed, and if so, what means" were reasonable to remedy such conditions. But it is undisputed that OPCA implemented the written recommendations of its Arena and Trails Committee by installing posts in the ground on the trails.

representatives at their depositions. An OPCA director admitted "[t]he OPCA board doesn't know who actually takes the trail on a daily basis," "there's no security guard at the front of Orange Park Acres or [OPCA] that checks everyone in and takes IDs when they come in to" the community of Orange Park Acres, and the OPCA trail system is "open to the public." The same director agreed with the following hypothetical question: "Anyone in Southern California who knows where the OPCA trail system is could put their horse in the trailer, drive over to Orange Park Acres park, unload the trailer, saddle up the horse and go for a ride on the OPCA trails." A second OPCA director admitted "a rider could ride from someplace well outside the OPCA trail system onto . . . the OPCA trails readily" and "[t]he OPCA trails are really open to the public in terms of access." A member of the OPCA Arena and Trails committee admitted "[p]eople other than just the residents of OPCA ride horses on the OPCA trail system" and "the OPCA trail system is a system that can be accessed by a member of the public at any time."

Carolyn also relied on several declarations in support of his opposition papers and Carolyn's summary judgment motion. Cheryl A. Skigin, one of Carolyn's attorneys, declared she has owned a home and lived in the Broadmoor-Saddlehill subdivision since 1999, and that she has lived in Orange Park Acres since 1991. Construed liberally, Skigin's declaration indicates she and others she knows (who are not members or residents of OPCA) have ridden horses on "trails which are the subject of this litigation" since 1991 (the declaration is

not clear as to whether the "trails which are the subject of this litigation" are OPCA's trails or the interconnected "trail system" into which OPCA's trails feed). Skigin also attests: "There is no distinction between where the trails which are within the Broadmoor-Saddlehill development begin and where the trails which are part of the County of Orange, City of Orange end or commence. Certain trails, such as the trail referred to as Pig Trail border both Broadmoor-Saddlehill and the property in the unincorporated portion of Orange County, the City of Orange and potentially other developments within the Orange Park Acres area. The trails are integrated and form a network."

The remainder of Skigin's declaration, as well as the declaration of Carolyn's other attorney, B. Paul Husband, relates to the issue of whether the OPCA trails affect interstate commerce as required to invoke the applicability of the ADA. As discussed in the analysis below, we do not reach the question of whether the trails affect interstate commerce. Thus, we need not lay out in detail Carolyn's evidence attempting to establish this component of his ADA claim. Nor need we wrestle with whether the court properly sustained evidentiary objections to the Skigin and Husband declarations. Even if the evidence is allowed, our analysis is unaffected.

Although Carolyn's declaration was not specifically submitted in opposition to OPCA's motion, we set forth pertinent portions to assist us in our review. "At this time, I am too weak from a muscular standpoint, and my balance is too poor to ride a horse. It is now too

difficult for me to maintain my grip with my legs if I were to try to ride astride a horse, plus I cannot maintain my balance sufficiently to ride." "I would like to participate in an equestrian sport by means of riding in a horse-drawn carriage, or some other appropriate horse-drawn vehicle. I live near Orange Park Acres, and I am aware of the [OPCA] Trail System. . . . I made plans to use the [OPCA] Trail System by means of a horse-drawn carriage in or about July 2007, but to my great dismay, I found that the trails in the OPCA Trail System were no longer available for my use because the OPCA Trail System had been blocked to use by horse-drawn carriages by means of large posts having been embedded in the ground at entrances to the Trails." "I had intended to use the OPCA Trail System two or three times per month, or more, if my health permitted." "Because of my disability, the only way that I could have access to the equestrian trails of the OPCA Trail System is in a horse-drawn carriage."

DISCUSSION

The court found the trails did not constitute a public accommodation as a matter of law. This determination, according to the trial court, precluded Carolyn from seeking relief under any of his five causes of action. (See Code Civ. Proc., § 437c, subd. (o)(1) [cause of action has no merit if "[o]ne or more of the elements of the cause of action cannot be separately established"].) Carolyn appears to concede that establishing the trails are "public accommodations" is an element of each of his causes of action, as his briefs do not argue otherwise.

We will review de novo whether there is any triable issue of material fact on the classification of the trails as public accommodations. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142.)

We *will not* address whether OPCA actually discriminated against Carolyn under any of the causes of action pleaded by Carolyn. (See 42 U.S.C. § 12182; Civ. Code, §§ 51, subd. (b), 54, subd. (a), 54.1, subd. (a).) This issue was not the subject of OPCA's motion for summary judgment and played no role in the court's grant of OPCA's motion for summary judgment. We emphasize at the outset of our analysis that the merits of Carolyn's discrimination claim (i.e., OPCA discriminated against him as a disabled person by blocking vehicle access to the trails) should be kept separate from the issue of whether OPCA's trails are a public accommodation. It is also unnecessary to reach the question of whether the trails affect interstate commerce. The court did not grant summary judgment to OPCA on that ground and the state law causes of action cannot be decided with regard to the trails' effect (or lack thereof) on interstate commerce.

Public Accommodation

Title III of the ADA[4] provides: "No individual shall be discriminated against on the basis of disability in the

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4. "[S]tate courts have concurrent jurisdiction of ADA claims." (*Black v. Department of Mental Health* (2000) 83 Cal.App.4th 739, 744, fn. 4.)

full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of *any place of public accommodation* by any person who owns, leases (or leases to), or operates a place of public accommodation." (42 U.S.C. § 12182(a), italics added.)

Under the ADA, "[t]he phrase 'public accommodation' is defined in terms of 12 extensive categories . . . ." (*PGA Tour, Inc. v. Martin* (2001) 532 U.S. 661, 676.) Two of the 12 public accommodation categories listed in the ADA are arguably applicable to the OPCA trails: "The following private entities are considered public accommodations . . . , if the operations of such entities affect commerce —" "a park, zoo, amusement park, or other place of recreation"; "a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation." (42 U.S.C. § 12181(7).) The ADA's "legislative history indicates [the public accommodation categories] 'should be construed liberally' to afford people with disabilities 'equal access' to the wide variety of establishments available to the nondisabled." (*Martin*, at pp. 676-677 [professional golf tour is public accommodation].) For instance, a private marina, which rents slips to an exclusive clientele in Marina Del Rey, is a public accommodation under the ADA even though marinas are not specifically identified by name in title III of the ADA. (*Nicholls v. Holiday Panay Marina, L.P.* (2009) 173 Cal.App.4th 970-972 [also holding "restricted access does not, by itself, make an accommodation nonpublic"].) "Whether a particular facility is a 'public accommodation' under the ADA is a question of law." (*Jankey v. Twentieth Century Fox Film Corp.* (C.D.Cal. 1998) 14 F.Supp.2d 1174, 1178 (*Jankey*).)

Appendix A

California law defines "public accommodation" in a different manner. Health and Safety Code section 19955 defines "'public accommodation'" to mean "a building, structure, facility, complex, or improved area which is used by the general public and shall include auditoriums, hospitals, theatres, restaurants, hotels, motels, stadiums, and convention centers." The structural access standards promulgated in connection with Health and Safety Code section 19955 et seq. and Government Code section 4450 et seq. "'give meaning to the public accommodation law prohibiting discrimination against the handicapped . . . .'" (*Hankins v. El Torito Restaurants, Inc.* (1998) 63 Cal.App.4th 510, 520.)

Under applicable provisions of the Disabled Persons Act (Civ. Code, § 54 et seq.), "[i]ndividuals with disabilities shall be entitled to full and equal access, as other members of the general public, to . . . places of public accommodation, amusement, or resort, and other places to which the general public is invited . . . ." (Civ. Code, § 54.1, subd. (a)(1), see also § 54, subd. (a) ["Individuals with disabilities or medical conditions have the same right as the general public to the full and free use of the streets, highways, sidewalks, walkways, public buildings, . . . public facilities, and other public places"].) The Unruh Civil Rights Act entitles all persons, regardless of "sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation . . . to . . . full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." (Civ. Code, § 51, subd. (b).) As Carolyn has

not argued otherwise, we assume, without deciding, that his Unruh Civil Rights Act claim can only proceed if the trails are deemed a public accommodation.

Common Areas and Public Accommodations

Stated with precision, the question presented is whether recreational common areas within a common interest development are public accommodations under the following circumstances, which are undisputed in the record before us: (1) the recreational area at issue is a fenced trail with various entry points spread over OPCA's common area; (2) the entry points include architectural barriers to access by vehicles; (3) the trails are linked to a larger web of privately owned and publicly owned trails in Orange County; (4) the OPCA trails are accessible to the general public, in that OPCA follows a custom of not precluding members of the general public from utilizing the OPCA trails; and (5) OPCA does not charge fees to members of the general public for utilizing its trails or otherwise attempt to commercially exploit the trails.

We first dispense with what might be termed a "standing" argument made by OPCA throughout its brief. Carolyn does not own property within the common interest development. As the trails are on private land owned by the members of OPCA and operated by OPCA, it is clear OPCA could bar the general public, including Carolyn, from accessing the trails if it wished to do so. (See *Liebler v. Point Loma Tennis Club* (1995) 40 Cal.App.4th 1600, 1611-1612 [association may limit

usage of tennis facilities to residents of condominiums]; Civ. Code, § 1009 [no "public recreational use" of private real property "shall ever ripen to confer upon the public or any governmental body or unit a vested right to continue to make such use permanently"].) The record, however, discloses no indication OPCA has ever attempted in the past or intends in the future to restrict access to its trails. If the OPCA trails are a public accommodation by reason of the public's use of the trails, OPCA may not discriminate against disabled individuals in its management of the trails, regardless of whether they are residents within the confines of the common interest development.

Moving to the substantive issue before us, purely residential areas of a common interest development are not public accommodations. (See *Coronado v. Cobblestone Village Community Rentals, L.P.* (2008) 163 Cal.App.4th 831 [holding residential apartment complex, including path from apartment to parking area, was not public accommodation and noting "ADA does not apply to residential facilities such as . . . condominiums"], disapproved on other grounds in *Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 678; *Indep. Housing Services v. Fillmore Ctr.* (N.D.Cal. 1993) 840 F.Supp. 1328, 1344 ["The residential portions of Fillmore Center (the only portions at issue in this suit) do not themselves fall within the bounds of the ADA, since apartments and condominiums do not constitute public accommodations within the meaning of the Act"].)

Conversely, commercial real estate open to the public qualifies as a public accommodation even though it is a part of a residence or residential development. (See *Baltimore Neighborhoods, Inc. v. Rommel Builders, Inc.* (D.Md. 1999) 40 F.Supp.2d 700, 705-706 [denying summary judgment in part because model unit at real estate development could be public accommodation if found to be sales office]; 28 C.F.R. § 36.207(a) ["When a place of public accommodation is located in a private residence, the portion of the residence used exclusively as a residence is not covered by this part, but that portion used exclusively in the operation of the place of public accommodation or that portion used both for the place of public accommodation and for residential purposes is covered by this part"].)

The instant case deals solely with recreational common area space within a common interest development, not residential space. Two recent California cases provide some guidance in resolving whether the OPCA trails are "public accommodations." (*Birke v. Oakwood Worldwide* (2009) 169 Cal.App.4th 1540 (*Birke*); *Coronado v. Cobblestone Village Community Rentals, L.P., supra,* 163 Cal.App.4th 831.)

In *Birke*, the trial court sustained defendant Oakwood's demurrer to a complaint which alleged, inter alia, that Oakwood violated title III of the ADA by failing to limit secondhand smoke in the outdoor common areas at the residential complex where plaintiff Birke lived. (*Birke, supra,* 169 Cal.App.4th at pp. 1543-1546.) The

common areas at issue included swimming pools and a playground. (*Id.* at p. 1553.) The *Birke* appellate court affirmed the trial court's order sustaining the demurrer without leave to amend as to Birke's ADA claim, finding persuasive the "contention that the ADA does not apply to apartments and condominiums" and also citing the dearth of specific facts alleged in the operative complaint. (*Ibid.*)

Justice Perluss wrote a separate opinion in *Birke*, dissenting with regard to the majority holding Birke did not adequately plead a cause of action under the ADA. (*Birke*, *supra*, 169 Cal.App.4th at p. 1553-1556 (conc. & dis. opn. of Perluss, J.).) In addition to questioning whether Oakwood's housing complex might constitute "transient lodging" (like boarding houses, dormitories, resorts, hotels, motels, and inns) and therefore qualify as a public accommodation in its entirety, Justice Perluss also asserted "the fact a facility such as an apartment complex itself may not fall within the ADA's statutory definition of 'public accommodation' does not mean the site may not contain one or more of the enumerated public accommodations within its confines." (*Id.* at p. 1554.) Justice Perluss suggested the common areas at issue "are places of recreation within the meaning of title 42 United States Code section 12187(7)(L) ('a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation') even if the apartment complex itself is a residential property and not a public accommodation." (*Id.* at p. 1555.)

Appendix A

In *Coronado*, *supra*, 163 Cal.App.4th at page 835, plaintiff Coronado sued Cobblestone Village, the apartment complex where Coronado resided. Coronado claimed the existence of a raised curb rather than an access ramp on the path outside his apartment leading to the parking lot was a violation of the Unruh Civil Rights Act and the Disabled Persons Act. (*Coronado*, at p. 835.) "The apartments and common areas around the [Cobblestone Village] apartments are reserved for use by tenants and guests of tenants only, although other persons might enter the complex since defendants' employees do not patrol the grounds. Vehicles are able to enter the apartment complex by means of a private driveway that connects with [a public street] and winds through the interior of the complex." (*Id.* at p. 836.) The *Coronado* trial court, on its own motion during trial, dismissed the Unruh Civil Rights Act and Disabled Persons Act claims, explaining that the residential areas of the apartment complex (not including the leasing office) were not public accommodations. (*Coronado*, at p. 838.)

The *Coronado* appellate court affirmed after finding the sidewalk/parking lot common area outside Coronado's apartment was not a public accommodation under the ADA and was not an area used by the general public subject to the structural access standards of Health and Safety Code section 19955 et seq. and Government Code section 4450 et seq. (*Coronado*, at pp. 845-851.) Of note to the dispute here, the *Coronado* court explained: "[T]he ADA should be reasonably construed and applied in accordance with this intent.

This means that, where there is a multiuse facility in which there is a commercial office open to the general public but also residential and common areas that are not open to the general public, it is appropriate to consider the particular area in question when attempting to determine the applicability of ADA structural access standards or other ADA requirements." (*Id.* at p. 851.)

In sorting through whether OPCA's trails are "public accommodations," we also find *Jankey*, *supra*, 14 F.Supp.2d 1174, to be instructive. In *Jankey*, the court granted summary judgment to the defendant film studio with regard to plaintiff Jankey's disability discrimination claim under title III of the ADA; the court dismissed Jankey's state law claims. (*Jankey*, at p. 1176.) Jankey, an occasional guest at the studio, alleged the studio's commissary, studio store, and on-site ATM machine were public accommodations. (*Id.* at p. 1177.) Defendant argued these facilities (which would obviously be public accommodations in other contexts) were not public accommodations because they were located on the studio lot, which was open only to employees of defendant or its affiliates and their authorized business guests. (*Id.* at p. 1180.)

In its analysis, the *Jankey* court recognized "'[m]any facilities that are classified as public accommodations are open only to specific invitees.'" (*Jankey, supra*, 14 F.Supp.2d at p. 1178.) The court then identified several factors to aid its task of identifying whether the studio's facilities were a "public accommodation." "Among the factors the court considers

in determining whether a facility is genuinely 'private,' and therefore exempt, are the following: the use of the facilities by nonmembers (or nonemployees, in the commercial context); the purpose of the facility's existence; advertisement to the public; and profit or non-profit status. [Citation.] Under the first factor, use by nonmembers (or nonemployees), the court may consider 'the extent to which [the facility] limits its facilities and services to [employees] and their guests.' [Citation.] 'Regular use' or 'indiscriminate use' by nonmembers (or nonemployees) contradicts private status." (*Id.* at p. 1179.) Although these factors were identified and applied in a different context, we think the factors also have utility in the context of determining whether common areas in a common interest development are "public accommodations."

The Department of Justice addressed the general issue before us in a 1992 letter drafted in response to a citizen's request for information about the ADA's applicability to a "clubhouse" at his "housing development": "The ADA does not apply to strictly residential facilities. Assuming your housing complex is strictly residential and would not be considered a social service center establishment, whether the ADA applies to the clubhouse *depends on who is entitled to use the clubhouse.* If activities in a clubhouse within a residential complex are intended for the exclusive use of residents and their guests, the facility is considered an amenity of the housing development. It would not be considered a public accommodation subject to the accessibility requirements of the ADA. . . . [¶] If the

clubhouse facilities and activities are made *available to the general public for rental or use, they would be covered by the ADA*. Once covered by the ADA, the owners or operators of the clubhouse would be required to remove architectural barriers to accessibility if their removal is readily achievable, that is, without much difficulty or expense." (Dept. of Justice, Office on the Americans with Disabilities Act, 202-PL-118, Sept. 11, 1992, italics added.)

The Attorney General of California answered a similar question in much the same fashion in 1982: "We are asked whether a recreation building in a mobilehome park is a 'public accommodation or facility' within the meaning of [Health and Safety Code section 19955]. We conclude that a recreation building in a mobilehome park is not a 'public accommodation or facility' within the meaning of section 19955 so as to be required to be accessible and usable by handicapped persons." (65 Ops.Cal.Atty.Gen. 72 (1982).) "To be brought within the ambit of section 19955 a facility must be *public*. . . . [T]he recreation building just does not have the characteristics and incidents of being public that section 19955 not only contemplates but specifically requires." (*Id.* at p. 74.) "Undoubtedly [a recreation building] is open to a more general class than the residents of the park, for surely it is available to their families and invited guests. Use by that expanded group of persons in our view, however, does not reach the use 'by the general public' spoken of in section 19955. There are still *meaningful restrictions* on who may use the facilities, which considerably narrows their [availability]

to the general public — [unlike] an auditorium, hospital, theater, restaurant, hotel, motel, stadium, or convention center. . . . Furthermore, unlike those facilities, the purpose for whose creation is based upon their being made continuously available to the general public and whose economic viability cannot survive without their being so available, the recreation center at a mobilehome park is neither so created nor dependent. Rather, it is a secondary appendage to another unit, the park itself which, like it, neither contemplates nor needs accessibility of continuous use by the general public for its sustenance." (*Id.* at p. 75.) This opinion letter also indicated the result would be different if the recreation building was used "'by the general public.'" (*Ibid.*) The letter did not identify the precise dividing line, however, between use by the "'general public'" and the uses specified in the letter (use by residents, family, friends, and other invitees).

Several commentators come to much the same conclusion. "The [ADA] applies to 'public accommodations.' This may include facilities that are part of a common interest development, such as a sales or rental office receiving public traffic, or commercial facilities that are part of a residential project. A meeting room leased to the public for a fee is subject to the act, but not a room used only by the association members." (Hanna & Atta, California Common Interest Developments: Law and Practice (2008) § 22.45.) "[I]f a community association or condominium owns, operates, or leases a swimming pool, tennis court, or other recreational facility that is open to members of the

general public, then, with respect to the operation of the recreational facility, the community association or condominium would be a place of public accommodation governed by Title III of the ADA." (Matthew Bender, ADA: Public Accommodations and Commercial Facilities, § 2.04.) "A recreational facility that is open to members of the public (rather than being reserved exclusively for the use of association members and their families and guests) is probably a place of public accommodation. [¶] Other places of public accommodation that are sometimes owned, operated, or leased by associations include: [¶] Day care center; [¶] Senior citizen centers; [¶] Refreshment stands; and [¶] Meeting rooms that are occasionally rented to business or civic groups." (Ransom, *How the Americans with Disabilities Act Affects Residential Community Associations* (1993) 9 Practical Real Estate Lawyer 55, 57.)

The OPCA Trails

After duly considering all of the aforesaid authorities, we conclude OPCA's trails are not public accommodations under either the ADA or California law. We agree with the premise that recreational common areas within common interest developments can be classified as public accommodations in appropriate circumstances. But we think it clear OPCA's trails would not be a public accommodation if OPCA actively excluded the general public from using the trails. Moreover, we do not think OPCA's private trails transform into public accommodations merely because OPCA does not actively exclude members of the public from using the trails. (See *Coronado*, *supra*, Cal.App.4th at pp. 836, 845-851.)

OPCA's trails are not like the zoos, golf courses, health spas, bowling alleys, or amusement parks specifically identified as public accommodations in the ADA. (28 U.S.C. § 12181(7).) Nor are the trails like the auditoriums, hospitals, theatres, restaurants, hotels, motels, stadiums, and convention centers specifically mentioned in Health and Safety Code section 19955, subdivision (a).

Each of the examples listed in the ADA[5] and the Health and Safety Code illustrate the broader concept

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5. The complete list of "entities" comprising "public accommodations" under the ADA is as follows: "(A) an inn, hotel, motel, or other place of lodging, . . .; [¶] (B) a restaurant, bar, or other establishment serving food or drink; [¶] (C) a motion picture house, theatre, concert hall, stadium, or other place of exhibition or entertainment; [¶] (D) an auditorium, convention center, lecture hall, or other place of public gathering; [¶] (E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment; [¶] (F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment; [¶] (G) a terminal, depot, or other station used for specified public transportation; [¶] (H) a museum, library, gallery, or other place of public display or collection; [¶] . . . [¶] (J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education; [¶] (K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and [¶] (L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation." (42 U.S.C. § 2181(7).)

that places of public accommodation are places designed and intended to provide services, goods, privileges, and advantages to members of the public, usually in exchange for payment (and when not requiring payment, often motivated by some other advantage to the entity providing the accommodation, such as promoting its good will to the community). The specific statutory examples are illustrative of the types of places that constitute public accommodations, not a replacement for the requirement that the alleged public accommodation is actually an accommodation to and for the public. Indeed, even a specifically listed recreational site (e.g., a bowling alley) would not be a public accommodation if it were built by a private individual on private land solely for the personal enjoyment of the individual and not opened to the public.

There is no evidence in the record suggesting OPCA's trails were built for anyone other than its own members. There is no evidence in the record suggesting OPCA encourages public use of its trails, through advertising or otherwise. Nor is there evidence in the record suggesting OPCA charges fees to members of the public for using the trails or benefits in other ways from the public's use of the trails. The OPCA trails are an "amenity" provided to OPCA's members in exchange for their membership and association dues, not a public accommodation. OPCA "neither contemplates nor needs accessibility or continuous use [of the trails] by the general public for its sustenance." (65 Ops.Cal.Atty.Gen. 72, *supra*, at p. 75.)

In coming to this conclusion, we are mindful of "the hardships suffered by individuals who have disabilities . . . ." (*Coronado*, *supra*, 163 Cal.App.4th at p. 851.) We do not think the result in this case, though, will have negative wide ranging consequences to disabled individuals seeking equal access to recreational opportunities. Our holding is consistent with applying the structural access standards mandated by state and federal disability law to homeowners' associations if such associations create public accommodations within the common areas of the common interest development. For instance, a pool, park, or trail open to the public for a fee would be a public accommodation, regardless of the recreational facility's location in a common interest development. We disagree with the reasoning of the majority opinion in *Birke*, *supra*, 169 Cal.App.4th at page 1553, to the extent it suggests there is a bright line rule protecting residential complexes from all liability for structural access deficiencies under the ADA. We hold only that a private property owner (here, a homeowners' association) does not convert private recreational property into a public accommodation by failing to actively deny the public access to the recreational property.

We also note homeowners' associations do not necessarily escape application of laws protecting disabled individuals even if its common areas are not deemed to constitute a public accommodation. Residential areas, including homeowners' associations, can be (in appropriate circumstances) subject to federal and state fair housing law restrictions, which are not dependent

upon a "public accommodation" finding. (See 42 U.S.C. § 3601 et seq.; Gov. Code, § 12900 et seq. (FEHA); Civ. Code, § 1352.5 [prohibiting restrictive covenants in common interest development declarations that violate Gov. Code, § 12955]; Cal. Code Regs., tit. 24, § 1101A.1 et seq. [housing accessibility standards applicable to multifamily dwelling units and the common areas associated therewith]; *Auburn Woods I Homeowners Assn. v. Fair Employment & Housing Com.* (2004) 121 Cal.App.4th 1578, 1584, 1598-1599 [under FEHA, Fair Employment and Housing Commission entitled to conclude permitting severely depressed individuals to own dog was reasonable accommodation required of association, which banned dogs in its CC&R's]; *Southern California Housing Rights Center v. Los Feliz Towers Homeowners Assn. Bd.* (C.D.Cal. 2005) 426 F.Supp.2d 1061, 1066-1068 [disabled condominium resident requested special parking accommodation; court granted summary judgment to association on ADA claim because association is not "public accommodation," but found material issue of fact with regard to state and federal fair housing claims].) But Carolyn is not a member of OPCA, a resident of the grounds controlled by OPCA, or someone who has unsuccessfully attempted to procure residency within OPCA. Carolyn thus did not (and could not) bring a claim under state or federal fair housing law.

Finally, we note that classifying OPCA's trails as a public accommodation subject to the access standards of the ADA and California law could have perverse consequences for the disabled and able-bodied alike.

Members of the public, including disabled individuals, currently enjoy the use of OPCA's trails without charge.[6] Non-members of OPCA who use the trails are free riders — those on horseback quite literally so. Although there is no evidence in the record to support this observation, there are undoubtedly other owners of private property in California who tolerate trespasses upon their private recreational property. (See Civ. Code, § 1009, subd. (a)(1) ["It is in the best interests of the state to encourage owners of private real property to continue to make their lands available for public recreational use"].) It would be unfortunate if property owners (including but not limited to homeowners' associations) presently inclined toward nonenforcement of their right to exclude the public from recreational areas changed their outlook because of fears of civil litigation conducted by individuals without an ownership stake in the recreational area at issue. Indeed, the most likely explanation for OPCA's neglect of its members' property rights is the cost and hassle associated with excluding nonmembers and including members. It is possible a decision contrary to that reached here could lead a previously apathetic association (or individual landowner) to invest in fences, security, access technology, and other means of excluding the public from privately owned recreational areas.

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6. It is unclear precisely how much benefit the OPCA trails offer to the public, in light of the nearby availability of trails owned by public entities and the limited number of individuals with the inclination and financial ability to ride horses as a means of recreation. Nevertheless, the record suggests there is some benefit to the general public in being able to access OPCA's trails.

Appendix A

DISPOSITION

For the foregoing reasons, we affirm the judgment. OPCA shall recover its costs on appeal.

IKOLA, J.

WE CONCUR:

O'LEARY, ACTING P. J.

MOORE, J.

APPENDIX B — ORDER GRANTING SUMMARY JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF ORANGE FILED OCTOBER 23, 2008

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF ORANGE

Case No. 07 CC 09555

EVAN CAROLYN,

Plaintiff,

v.

ORANGE PARK COMMUNITY ASSOCIATION, a California Corporation, and DOES 1 through 25,

Defendants.

Hearing date:	September 5, 2008
Time:	11:00 p.m.
Dept:	C32
Judge:	Honorable Steven L. Perk
Action filed:	September 4, 2007
Trial date:	September 15, 2008

Appendix B

ORDER GRANTING SUMMARY JUDGMENT

Defendant Orange Park Community Association's motion for summary judgment or, in the alternative, for summary adjudication of issues, came on for hearing on September 5, 2008, in Department C32 of the within Court before the Honorable Steven L. Perk. Paul Husband appeared on behalf of Plaintiff Evan Carolyn and Mitchell Brachman appeared on behalf of Defendant Orange Park Community Association.

After full consideration of the evidence and the written and oral submissions of the parties, and ruling on objections to an earlier proposed Order, the Court finds that there is no triable issue of material fact and that Defendant Orange Park Community Association is entitled to judgment as a matter of law for the following reasons:

1. The Court finds that the trails are not a "public accommodation" within the definition of the Americans with Disabilities Act, California Disabled Persons Act, Unruh Act, Government Code §4450 and Health and Safety Code §19955. Unless the trails are a public accommodation within the meaning of the statutes, there is no violation.

2. Plaintiff's Motion for Summary Judgment heard at the same date and time is denied. Plaintiff has failed to meet his burden to prove each element of each of his causes of action. Plaintiff's motion lacks an evidentiary showing that he has been denied access to the trails.

Appendix B

Defendant has shown that access to the trails is ADA compliant by allowing wheelchair access. Plaintiff presents no authority that this is not ADA compliant. In addition, Plaintiff fails to show that the trails are a place of public accommodation and/or that they affect commerce.

This finding is based upon the arguments presented in the moving papers as well as in the Opposition to Plaintiff's corresponding motion for summary judgment. This is further supported by the Declarations of James Dickinson and Joanne Pritts submitted with the moving papers and the Declaration of Paul Bishop submitted in conjunction with the Reply.

Association's Request for Judicial Notice is GRANTED as to Plaintiff's Complaint.

The Court makes the following rulings on the respective parties' evidentiary objections:

1. Plaintiff's objections to the Declaration of Paul Bishop are overruled as to Paragraphs 4 and 5, and sustained as to Paragraph 5 (sentences 3 and 4), 7 and 8.

Plaintiff's objections to the Declaration of Mitchell Brachman are sustained as to Paragraph 3 and overruled as to the remainder.

THEREFORE, IT IS ORDERED that Defendant Orange Park Community Association's motion for

summary judgment is granted and that judgment in favor of Defendant Orange Park Community Association and against Plaintiff Evan Carolyn shall be entered accordingly. A proposed Judgment is submitted and attached herewith.

Dated: October 23, 2008

s/ STEVEN L. PERK
Hon. Steven L. Perk
Judge of the Superior Court

APPENDIX C — JUDGMENT IN FAVOR OF DEFENDANT ORANGE PARK COMMUNITY ASSOCIATION OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF ORANGE FILED OCTOBER 23, 2008

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF ORANGE

Case No. 07 CC 09555

EVAN CAROLYN,

Plaintiff,

v.

ORANGE PARK COMMUNITY ASSOCIATION, a California Corporation,

Defendant.

[Assigned to Hon. Steven Perk, Department C32]

(Complaint filed: September 4, 2007)

(Trial date: September 15, 2008)

Appendix C

JUDGMENT IN FAVOR OF DEFENDANT ORANGE PARK COMMUNITY ASSOCIATION

The Court having granted the Motion for Summary Judgment filed by Defendant Orange Park Community Association ("Association") and the Order granting the Motion for Summary Judgment submitted herewith and attached hereto,

IT IS HEREBY ORDERED ADJUDGED AND DECREED that:

1. Judgment is entered in favor of Defendant Orange Park Community Association and against Plaintiff Evan Carolyn pursuant to the terms and ruling defined in the Order Granting Summary Judgment submitted herein;

2. Plaintiff will take nothing against Defendant Association; and

3. Defendant Association is awarded, as against Plaintiff, its costs of suit in a sum to be determined by a Memorandum of Costs to be submitted per Code.

DATED: 10/23/08

s/ Steven L. Perk
THE HONORABLE STEVEN L. PERK

APPENDIX D — MINUTE ORDER DATED SEPTEMBER 8, 2008

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER

MINUTE ORDER

Date: 09/08/2008 Time: 03:56:55 PM Dept: C32

Judicial Officer Presiding: Judge Steven L. Perk

Clerk: Nga Quach

Bailiff/Court Attendant: A. Lindquist

Reporter: None.

Case Init. Date: 09/04/2007

Case No: 07CC09555

Case Title: CAROLYN VS ORANGE PARK COMMUNITY ASSOCIATION

Case Category: Civil - Unlimited

Case Type: Civil Rights

Event Type: Chambers Work

Causal Document & Date Filed:

Appearances:

Appendix D

There are no appearances by any party.

The Court, having taken the above-entitled matter under submission on 09/05/2008, now makes the following ruling as posted on the internet:

Tentative ruling:

1. Defendant Orange Park Community Association (OCPA)'s Motion for Summary Judgment/Summary Adjudication:

Summary Judgment (MSJ):

Granted. The trails are not a "public accommodation" within the definition of the ADA, CDPA, Unrug Act, GC 4450 or H&S 19955. Unless the trails are "public accommodations" within the mean of one of the statutes there is no violation.

Summary Adjudication: Moot with the ruling of the MSJ.

Defendant OPCA's Request for Judicial Notice is Granted as to the plaintiff's Complaint.

Appendix D

2. Plaintiff Carolyn's Motion for Summary Judgment/ Summary Adjudication:

Summary Judgment:

Denied: Plaintiff has failed to meet his burden to prove each element of each of his causes of action.

Summary Adjudication:

Procedurally: *Denied*; because the plaintiff's separate statement of undisputed facts fails to comply with CCP 437c(f)(1) by identifying the facts applicable to each issue sought to be adjudicated.

Plaintiff's Evidentiary Objections to the Bishop Declaration: Overruled as to Paragraph 4 and 5. Sustained as to Paragraph 5 (3rd and 4th sentences), 7 and 8.

Plaintiff's Evidentiary Objections to the Brachman Declaration: Sustained as to Paragraph 3. Overruled as to the remainder.

Defendant's Evidentiary Objections to the Skigin Declaration: Overruled as to #1. Sustained as to each of the remaining objections 2-13.

Appendix D

Final Ruling:

1. Defendant's Motion for Summary Judgment/ Summary Adjudication — Tentative ruling is final.

2. Plaintiff's Motion for Summary Judgment/Summary Adjudication of Issues:

Summary Judgment – Denied; Plaintiff's motion lacks an evidentiary showing that he has been denied access to the trails. The defendant have shown that access to the trails is ADA compliant by allowing wheel chair access. Plaintiff presents no authority that this is not ADA compliance.

In addition, plaintiff fails to establish that the trails are a place of public accommodation and/or that they affect commerce.

Summary Adjudication – Tentative ruling is final.

Evidentiary rulings are final.

Prevailing party to give notice of ruling and to submit judgment pursuant to instruction posted with internet tentative ruling.

APPENDIX E — TENTATIVE RULING

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE

LAW AND MOTION PROCEDURES FOR DEPT. C-32
THE FOLLOWING ARE THE LAW AND MOTION PROCEDURES AND POLICIES FOR DEPT. C-32
THE HONORABLE STEVEN L. PERK

OBTAINING THE RULINGS:
Tentative rulings will usually be posted on the internet by 3:00 PM the Thursday prior to the scheduled Friday hearing. If your Internet service is not available you may contact the clerk in Dept. C-32 (714-834-2355) for the ruling.

PREVAILING PARTY SHALL GIVE NOTICE OF THE FINAL RULING TO EACH PARTY and PREPARE AN ORDER/JUDGMENT FOR THE COURT'S SIGNATURE IF THE MOTION IS DISPOSITIVE OF A PARTY OR THE CASE.

APPEARANCES:
If counsel wish to submit on the tentative ruling please call the court clerk (714-834-2355) to notify the court that all parties are submitting on the tentative and no appearance will be necessary. The tentative will then become the final ruling.

If no one appears at the hearing the tentative will be the final ruling.

Appendix E

ORAL ARGUMENT:
All requests for oral argument will be granted. Oral argument will be heard at the time scheduled for the motion. (Friday, 11:00 AM)

Argument will normally be limited to facts, law and argument not already submitted in the written Points & Authorities.

NOTICE TO COUNSEL:
Upon filing a motion, moving party shall mail a copy of this notice to opposing counsel. If opposing counsel appears unnecessarily because of moving party's failure to give notice of the above procedures, sanctions may be imposed.

TENTATIVE RULINGS ON LAW
& MOTION MATTERS
Date: Friday, September 5, 2008

#	Case Name	Tentative
1	**07CC10163 Bautista vs. Care Ambulance Service**	Continued to 9/10/08 at request of moving party.
2	**07CC09555 Carolyn vs. Orange Park Community Association**	1. Def., Orange Park Community Association, Motion for Summary Judgment/Summary Adjudication — Summary Judgment:

Appendix E

Granted: The trails are not a "public accommodation" within the definition of the ADA, COPA, Unrug Act, GC 4450 or H&S 19955. Unless the trails are "public accommodations" within the mean of one of the statutes there is no violation.

Def., OPCA, Request for Judicial Notice — Granted as to the Plt.'s Complaint.

2. Plt., Carolyn, Motion for Summary Judgment/ Summary Adjudication — Summary Judgment: Denied; Plt. has failed to meet his burden to prove each element of each of his C/As.

Summary Adjudication:

Procedurally; Denied; b/c the Plt.'s separate statement of undisputed facts fails to comply with CCP 437c(f)(1) by identifying the facts applicable to each issue sought to be adjudicated.

Appendix E

Plt.'s Evidentiary Objections to the Bishop Declaration — Overruled as to Paragraph 4 and 5. Sustained as to Paragraph 5 (3rd and 4th sentences), 7 and 8.

Plt.'s Evidentiary Objections to the Brachman Declaration — Sustained as to Paragraph 3. Overruled as to the remainder.

Def. Evidentiary Objections to the Skigin Declaration — Overruled as to #1. Sustained as to each of the remaining objections 2-13.

***Final Ruling*:**

1. Def. Motion for Summary Judgment/ Summary Adjudication — Tentative ruling is final.

2. Plt. Motion for Summary Judgment/ Summary Adjudication of Issues —

Appendix E

Summary Judgment — Denied; Plt.'s motion lacks an evidentiary showing that he has been denied access to the trails. The Def. have shown that access to the trails is ADA compliant by allowing wheel chair access. Plt. presents no authority that this is not ADA compliance. In addition, Def. fails to establish that the trails are a place of public accommodation and/or that they affect commerce.

Summary Adjudication — Tentative ruling is final.

Evidentiary rulings are final.

3	**07CC10691 Citizens Automobile Finance, Inc. vs. Kennedy Easton**	1. Plt., Citizens Automobile, Motion for Summary Judgment Denied; After comparison of the Separate Statements of Fact triable issues of material fact are created by Facts 4, 5, 6, 12 and 13 (identity of the deponent and the signatory to the

Appendix E

Contract), 6, 12, and 13. In addition, Plt. fails to meet its burden on the issue of damages with the Trade declaration in not showing the how the damages were calculated and the basis for them.

Plt. Evidentiary Objections to the King Declaration — Sustained as to Paragraph 2, all exhibits.

Plt. Evidentiary Objections to the Spedding Declaration — Sustained.

Def. Evidentiary Objections to the Trado Declaration — Sustained Def. Evidentiary Objections to the Ernest Declaration — Sustained as to #1, 2, 3, 4.

Appendix E

		Final Ruling:
4.	30-2008-108245 **Dean vs. Yamaha Motor Corp. USA**	Motion Still Under consideration as of Sept. 8, 2008. Off calendar at request of moving party.
5	07CC04656 **Kim vs. Pacific Ocean Dyeing & Finishing, Inc.**	Continued to 1/23/09 at request of moving party.
6	05CC08362 **Meinhardt vs. Plail**	Continued to 9/12/08 at request of moving party.
7	30-2008-106570 **McKenzie vs. Coast Community College District**	1. Def., Coast Community, Motion for an Order Dismissing this Action With Prejudice — Granted; Plt. has not filed their amended complaint within the time granted after the court sustained the demur for failure to comply with the tort claims act. No opposition has been filed by Plt.

Appendix E

8	30-2007-100767 **Mission Financial Services Corp. vs. Bahador**	1. Plt., Mission Financial, Motion for Leave to File Amended Complaint — Granted; No prejudice will result to the Def. who has sufficient time to prepare for trial on the new allegations. First Amended Complaint is deemed filed and served as of Sept. 5, 2008.

APPENDIX F — ORDER OF THE SUPREME COURT OF CALIFORNIA DENYING PETITION FOR REVIEW FILED DECEMBER 23, 2009

Court of Appeal, Fourth Appellate District,
Division Three - No. G041177

S177639

IN THE SUPREME COURT OF CALIFORNIA

En Banc

EVAN CAROLYN,

Plaintiff and Appellant,

v.

ORANGE PARK COMMUNITY ASSOCIATION,

Defendant and Respondent.

The petition for review is denied.

Werdegar. J., was absent and did not participate.

APPENDIX G — ORDER OF THE COURT OF APPEAL, STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION THREE FILED OCTOBER 20, 2009

COURT OF APPEAL — STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

G041177

Sup. Ct. No. 07CC09555

EVAN CAROLYN,

Plaintiff and Appellant,

v.

ORANGE PARK COMMUNITY ASSOCIATION,

Defendant and Respondent.

ORDER

The petition for rehearing is DENIED.

s/ Ikola, J.
IKOLA, J.

WE CONCUR:

s/ O'Leary, J.
O'LEARY, J.

s/ MOORE, J.
MOORE, J.

APPENDIX H — RELEVANT STATUTES AND CONSTITUTIONAL PROVISIONS

42 U.S.C. § 12181 : US Code – Section 12181: Definitions

As used in this subchapter:

(1) Commerce

The term "commerce" means travel, trade, traffic, commerce, transportation, or communication -

(A) among the several States;

(B) between any foreign country or any territory or possession and any State; or

(C) between points in the same State but through another

State or foreign country.

(2) Commercial facilities

The term "commercial facilities" means facilities --

(A) that are intended for nonresidential use; and

(B) whose operations will affect commerce.

Such term shall not include railroad locomotives, railroad freight cars, railroad cabooses, railroad cars described in section 12162 of this title or covered under

this subchapter, railroad rights-of-way, or facilities that are covered or expressly exempted from coverage under the Fair Housing Act of 1968 (!1) (42 U.S.C. 3601 et seq.).

(3) Demand responsive system

The term "demand responsive system" means any system of providing transportation of individuals by a vehicle, other than a system which is a fixed route system.

(4) Fixed route system

The term "fixed route system" means a system of providing transportation of individuals (other than by aircraft) on which a vehicle is operated along a prescribed route according to a fixed schedule.

(5) Over-the-road bus

The term "over-the-road bus" means a bus characterized by an elevated passenger deck located over a baggage compartment.

(6) Private entity

The term "private entity" means any entity other than a public entity (as defined in section 12131(1) of this title).

(7) Public accommodation

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The following private entities are considered public accommodations for purposes of this subchapter, if the operations of such entities affect commerce —

(A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;

(B) a restaurant, bar, or other establishment serving food or drink;

(C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;

(D) an auditorium, convention center, lecture hall, or other place of public gathering;

(E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

(F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;

(G) a terminal, depot, or other station used for specified public transportation;

(H) a museum, library, gallery, or other place of public display or collection;

(I) a park, zoo, amusement park, or other place of recreation;

(J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;

(K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and

(L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

(8) Rail and railroad

The terms "rail" and "railroad" have the meaning given the term "railroad" in section 20102(1) of title 49.

(9) Readily achievable

The term "readily achievable" means easily accomplishable and able to be carried out without much difficulty or expense. In determining whether an action is readily achievable, factors to be considered include —

(A) the nature and cost of the action needed under this chapter;

(B) the overall financial resources of the facility or facilities involved in the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility;

(C) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(D) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the covered entity.

(10) Specified public transportation

The term "specified public transportation" means transportation by bus, rail, or any other conveyance (other than by aircraft) that provides the general public with general or special service (including charter service) on a regular and continuing basis.

(11) Vehicle

The term "vehicle" does not include a rail passenger car, railroad locomotive, railroad freight car, railroad caboose, or a railroad car described in section 12162 of this title or covered under this subchapter.

Appendix II

Article 1 – The Legislative Branch
Section 8 – Powers of Congress

The Congress shall have Power To lay and collect Taxes, Duties, *Imposts* and *Excises*, to pay the Debts and provide for the common *Defence* and general *Welfare* of the United States; but all Duties, *Imposts* and *Excises* shall be uniform throughout the United States;

To borrow money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and *Post Roads*;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

Appendix H

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;

To declare War, grant *Letters of Marque* and *Reprisal*, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as

may, by Cession of particular States, and the acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Appendix H

Article VI

All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

The Senators and Representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

Appendix II

Fourteenth Amendment (Amendment XIV) to the *United States Constitution*

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

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Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.